A **KWANG HAP SIANG (SERVICE STATION) SDN BHD**

v.

CALTEX OIL MALAYSIA LTD & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1590-2002]
1 AUGUST 2007

C ***CIVIL PROCEDURE:*** *Costs - Security for costs - Appeal against - Whether order for plaintiff to pay security for costs unjust - Companies Act 1965, s. 351*

This was an appeal by the plaintiff against the decision of the senior assistant registrar in allowing the defendants' application for D security for costs. The plaintiff's claim arose from an alleged breach of contract whereby the first defendant had granted the plaintiff a license to run its petrol station. Subsequently, another agreement was entered into between the parties whereby the second defendant, a subsidiary of the first defendant was allowed to take E over the management of the petrol station by reason that it was running at a loss. Subsequently, the agreement was terminated by the first defendant who then took over possession of the station. The appeal was opposed on the following grounds: (i) s. 351 of the Companies Act as interpreted in the case *Skrine & Co v. MBf* F *Capital Bhd Anor* is a two-stage process; (ii) based on the plaintiff's account for 1996, it was also clear that they were suffering a loss; (iii) the plaintiff had not been in operation or business since 1996.

Held (allowing the appeal):

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(1) The very purpose of the plaintiff's action against the defendants arose from the loss that it suffered from the operation of the petrol station in a contract which it had entered into with the first defendant and superimposed later H by another contract called Management In Transit with the second defendant subsidiary company; it would be too far fetched to assume that the plaintiff should be in a healthy financial position to commence legal proceedings against the defendants. On the contrary it would not be too far fetched I to assume that there was a possibility that the defendants may have been the cause of the plaintiff's loss that may have led to its being impecunious. An order that the plaintiff should be

made to pay security for costs would be most unjust under the circumstances as to do so would mean that the plaintiff would be denied its day in court merely by its poverty for which the defendants may possibly be the cause. (para 8)

Case(s) referred to:
Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 1 QB 609 ***(refd)***
Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(refd)***
Strukturmas (Selangor) Sdn Bhd v. Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351

For the plaintiff - SR Sreedevi Naidu; M/s M Manoharan & Co
For the defendants - Trevor George; M/s Lee Ong & Kandiah

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: (Ex-tempore)

[1] This is an appeal by the plaintiff against the decision of the senior assistant registrar in allowing the defendants' application for security for costs and for further and better particulars from the plaintiff.

[2] In this hearing the plaintiff is only appealing against the order given for security for costs.

[3] The plaintiff's claim arose from an alleged breach of contract whereby the 1st defendant had granted the plaintiff a licence to run its petrol station. Subsequently another agreement was entered into between the parties whereby the 2nd defendant, a subsidiary of the 1st defendant was allowed to take over the management of the petrol station by reason that it was running at a loss. Subsequently the agreement was terminated by the 1st defendant who subsequently took over possession of the station.

[4] The appeal is grounded as follows:

1. Section 351 of the Companies Act 1965 states as follows:

351. Security for costs.

(1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

Costs.

(2) The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the court may, in its discretion, direct.

2. Whereas the grounds for making the application as stated in para. 1 is because there were so many issues of law involved and that the trial of the case will take a long time to complete and also because the plaintiff company failed to provide penyata tahunan and that plaintiff was running at a loss at the relevant time. These are not credible reasons to allow security for costs.

3. See case – *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* [1973] 1 QB 609 – may not last.

[5] The appeal is opposed on the following grounds:

1. Section 351 of the Companies Act as interpreted in the case *Skrine & Co. v. MBf Capital Bhd & Anor & Other Appeal* [1998] 3 CLJ 432 per Gopal Sri Ram JCA is a two stage process.

2. Here it is clear that the credible evidence adduced by the defendants is that the plaintiff company had not filed its annual account since 1996. Under the decision in *Strukturmas (Selangor) Sdn Bhd v. Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344, such non filing raised the presumption that the company was not financially strong and/or operating.

3. Based on the plaintiffs account for 1996, it is also clear that they are suffering a loss ie, in the region of RM28,000+. This was not denied or refuted by the plaintiff through the exchange of affidavits.

4. The defendants also raised the point of the plaintiff not being in operation or business since 1996. This has also not been credibly denied by the plaintiff through the affidavit.

Findings And Decision

[6] The *Skrine* case provides the modus to decide whether a company should be made to pay security for costs under s. 351 of the Companies Act 1965.

[7] But whether or not an order for security for costs should be made under s. 351 of the Companies Act 1965 is still a matter of discretion for the court as the *Sir Lindsay* case, *supra*, says. It follows that an order for security for costs may still be refused notwithstanding that the court may have found that the company may not be able to meet the costs of the other party in the event that it fails in its action.

[8] Considering that the very purpose of the plaintiff's action against the defendants arose from the loss that it suffered from the operation of the petrol station in a contract which it entered into with the 1st defendant and superimposed later by another contract called Management In Transit with the 2nd defendant subsidiary company, it would be too far fetched to assume that the plaintiff should be in a healthy financial position to commence legal proceeding against the defendants. On the contrary it would not be too far fetched to assume that there is a possibility that the defendants may have been the cause of the plaintiff's loss that may have led to its being impecunious. An order that the plaintiff should be made to pay security for costs would be most unjust under the circumstances as to do so would mean that the plaintiff would be denied its day in court merely by its poverty for which the defendants may possibly be the cause.

[9] Accordingly I allow this appeal with costs.